IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

BOOSTER LODGE No. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1417

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE BOEING COMPANY, AND BOOSTER LODGE No. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

No. 71-1607

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

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I. THE RESIGNATION ISSUE

1. *Waiver*: The Board's argument on brief on the resignation issue reduces to a swift syllogism: (a) waiver of a statutory right must be clear and unmis-

takable; (b) the Union's rule against strikebreaking bars a resigner's postresignation return to work by implication rather than expressly; (c) it therefore does not manifest a clear and unmistakable relinquishment of a statutory right; (d) it is consequently unavailable to the Union to defend against its imposition of a court-collectible fine for strikebreaking (Bd. br. p. 11).

One prime flaw in the argument is that it assumes the premise on which the syllogism rests. It presupposes the existence of a statutory right. Yet the issue to be decided—which the Board still refuses to confront (Bd. br. p. 10 and n. 10)—is whether a union member does have a statutory right to return to work in an existing strike subsequent to his resignation, without incurring the liability of a court-collectible fine, despite a union rule barring such postresignation strikebreaking. *Granite State* decided that a postresignation return-to-work was statutorily protected against the discipline of a court-collectible fine where *no* limiting union rule existed. This case presents the question whether there is a statutory right to return to work subsequent to resignation, free of the discipline of a court-collectible fine, where a union rule barring postresignation strikebreaking does exist. That question must first be answered before any notion of "waiver" can properly enter the analysis. If there is no statutory right, there is nothing to waive. Nothing exists from which to subtract. Only if a statutory right is first found is it relevant to consider waiver of it.

We have shown that a union member does not have a statutory right to return to work in an existing strike subsequent to his resignation, free of the liability of

a court-collectible fine, in the face of a union rule barring postresignation strikebreaking (our brief pp. 84-90). The Board does not address our argument. Indeed, it does not even speak of a statutory right, preferring the waffling invocation of "statutory policy ..." (Bd. br. p. 11). And it explicitly disclaims a position on a union rule "expressly" limiting postresignation strikebreaking (Bd. br. p. 10 and n. 10), confining itself to a union rule which bars postresignation strikebreaking "by implication . . ." (Bd. br. p. 11). And it would invalidate an implied rule, solely because it is implied, on the ground that there may be no implied waiver of a statutory right. Yet its assertion of a statutory right rests on *ipse dixit* alone, and it studiously avoids meeting our argument that no statutory right exists.

It is time for the Board to stop playing Hamlet without Hamlet. This case cannot be sensibly analyzed without answering the underlying question whether a union member has a statutory right to return to work in an existing strike subsequent to resignation, without incurring the liability of a court-collectible fine, where a union rule bars postresignation strikebreaking. Only after it is first determined whether a statutory right does or does not exist can it be intelligibly ascertained what difference it makes, if any, that the rule is express or implied. To assert that a statutory right is abridged because the rule is implied is either question-begging or circular.

2. *Contract of adhesion*: The Board on brief asserts that a union constitution is a " 'contract of adhesion,' " that doubt as to the prohibitory reach of its terms should therefore be resolved against the union as the

drafter of the document, and that a union constitutional ban against strikebreaking should accordingly not be interpreted to bar a postresignation return-to-work "by implication" (Bd. br. pp. 11-12). This is a wholly artificial construct which does not withstand any analysis.

(a) The relationship of a member to his union is like that of a citizen to his government, not of a policyholder to an insurance company. The constitution governing the union community, like that governing the body politic, must be ungrudgingly interpreted to achieve the ends for which the members formed their union, not as if it were some lifeless trust indenture. The member and his union are not antithetical; the members are the union; the union is not the enemy. And no individual need subject himself to the obligations of union membership—the duties that the members have chosen to undertake towards each other in furtherance of their common endeavor—unless that is his wish.

(b) We begin with the voluntary undertaking of union obligations.

(*i*) In this case, under the terms of the agreement between the Union and Boeing, every nonmember had "the right to elect to become a member of the Union or to elect not to become a member of the Union . . ." (A. 156). A nonmember was informed that "[m]embership in the Union is a matter of your own free choice . . ." (A. 188). Accordingly, every employee who became a member did so because he wanted union membership.

(*ii*) But even if an agreement between a union and an employer were to require membership of all the

employees within the unit, compulsory membership means only that the employee is obligated to pay union dues and an initiation fee (our brief pp. 34-35, 38, 76). An agreement can commit an employee solely to such payments. He need not assume any other union obligation. When he chooses to become a full member, undertaking by that act to enjoy the totality of union benefits and to assume the whole of union obligations, he does so because that is what he wants to do. He is free to acquire or to forego full union membership as he wishes.

(*iii*) The element of constraint is highly limited even as to the payment of union dues and initiation fees under an agreement between a union and an employer which requires it. Experience has demonstrated overwhelmingly that employees who choose to be represented by a union also voluntarily pay dues and fees to it. When the 1947 amendments to the National Labor Relations Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement, obligating the employees covered by the agreement to pay union dues and initiation fees, could only be valid "if, following the most recent election held as provided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement . . ." This requirement was repealed on October 22, 1951 (Public Law 189, 82d Cong., 1st Sess.), it having proved "burdensome and unnecessary." *N.L.R.B.* v. *Gaynor News Co.*, 197 F.2d 719, 724 (C.A. 2, 1952), affirmed, 347 U.S. 17 (1954). Its pointlessness was manifest from the results of the union-shop authorization polls conducted by the Board. "During the 4 years

and 2 months, from 1947 to 1951, in which a union-shop authorization poll was required by the act before a valid union-shop agreement could be made, the Board conducted 46,119 such polls. Negotiation of union-shop agreements was authorized by vote of the employees in 44,795 of these polls. This was 97 percent of those conducted." [1] For the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2% of the employees, voted in favor of the union shop.[2] The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the unionship;[3] in 1949, of 1,471,092 valid votes, 93.9% favored the union shop;[4] in 1948, of 1,629,330 valid votes, 94.2% favored the union shop.[5]

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements should have forever put the quietus to the notion that dues and fees are unwillingly paid. These agreements operate compulsively only as to that small group known as " 'free riders,' *i.e.,* employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union. . . ." *Radio Officers' Union* v. *N.L.R.B.,* 347 U.S. 17, 41 (1954). Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation

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[1] 16 NLRB Ann. Rep. 10 (1951).

[2] *Id.* at 306.

[3] 15 NLRB Ann. Rep. 235 (1950).

[4] 14 NLRB Ann. Rep. 172 (1949).

[5] 13 NLRB Ann. Rep. 111 (1948).

to pay. Actual constraint is thus minimal even in the limited area where it may be lawfully exerted.

(*iv*) Acquisition of full union membership, and the consequent assumption of all union obligations, is therefore the free act of the employee, and even the payment of dues and fees under a union security agreement is in its essence voluntary. Of course any particular employee may join a union for one or more of a wide variety of reasons—self-interest, conviction, tradition, social suasion, accident. But, given his status as a full member, his motivation for acquiring full membership is irrelevant to his obligation to discharge the obligations which go along with it, as this Court explained in *Allis-Chalmers* (388 U.S. at 196):

> The majority *en banc* below nevertheless regarded full membership to be "the result not of individual voluntary choice but of the insertion of [this] union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F.2d, at 660. But the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed the union's picket line. It is clear that the fined employees involved in these cases enjoyed full union membership . . . . Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary.

(c) Accordingly, if what the Board on brief means by a contract of adhesion is that employees have no alternative but to join the union, this is simply not so. An employee who is a full member has acquired that

status because he elected it. But the Board may mean by a contract of adhesion that an employee who chooses to become a full member must take the union constitution as it exists. That is true, but only in the same sense that a person who moves into a new city or state must take the laws of those communities as they exist. This is inherent in the nature of acquiring membership in any existing, ongoing and self-governing institution. Analysis must therefore be much more discriminating to be meaningful.

First, a union constitution is the members' own ordering of their associational relationship. Acting in convention, by referenda, or at union meetings the members democratically determine for themselves how their union shall function to achieve their common end. They have no reason to adopt any rules which are antagonistic to their mutual interest as members. An employee who enters a union becomes therefore a member of a society run by rules congenial to every member's welfare. There is thus no basis for viewing those rules with a hostile eye on the assumption that they are fashioned with a bias adverse to the member. Second, there is no possible way that a worker aspiring to membership can negotiate with a union for a set of rules which suits him personally. This is not due to unequal bargaining power. It stems rather from the inherent communal necessity that the rules shall blanket the entirety of the membership evenhandedly without special exception for any. Third, the union constitution as it exists when the new member joins is not a closed instrument. The new member on an equal footing with the old members has the right to seek to change the existing rules through the democratic channels open to all.

To call a union constitution a contract of adhesion is therefore terrifyingly inapt. A union constitution has about the same resemblance to an insurance policy as a labor organization has to an insurance company.

(d) But even if it were appropriate to characterize a union constitution as a contract of adhesion, it does not follow that a rule against strikebreaking may not rightly be interpreted to bar a postresignation return to work.

(*i*) The Board on brief would have it that implication is forbidden in the interpretation of an adhesion contract (Bd. br. pp. 11-12). This is a vast overstatement. The conventional formulation is that, after all other processes of interpretation have been exhausted without resolving the meaning of the instrument, "the court will adopt that one which is the less favorable in its legal effect to the party who chose the words." 3 Corbin, Contracts, § 559, p. 262; see also, *id.* p. 268. It is one of a number of "*secondary* rules" aiding interpretation to be invoked if meaning cannot be satisfactorily ascertained through the primary routes. Restatement, Contracts, § 236(d) and Comment on Clause (d).

But the Board on brief would convert a secondary interpretative aid into the dominant determinant of meaning. It would bar a just and reasonable interpretation, not because that interpretation is not the fair import of the union rule, but just because its meaning was arrived at by implication. No such barren canon exists for the interpretation of any instrument.

Furthermore, it makes no sense to say of a union constitution that doubt as to its meaning is to be "resolved

against the party who drafted the terms" (Bd. br. p. 11). The drafters of the constitution are the members themselves operating through the democratic channels they have formed to give practical effect to their communal wishes. Why should an interpretation of their constitution be preferred which operates more strongly against them? More particularly, why should a rule against strikebreaking be interpreted in favor of the strikebreaker rather than the striker? It is a measure of the sterility of the invocation of a secondary aid to interpretation that the Board on brief does not even bother to ask, much less answer, these questions.

(*ii*) Another consequence of characterizing an instrument as a contract of adhesion is a candid refusal to give effect to a term found to be "unconscionable" or "unreasonable" 3 Corbin, Contracts, § 559, pp. 270-271. We welcome the application of that test. The entire burden of our argument is that it is fair and reasonable to interpret a prohibition against strikebreaking to bar a postresignation return to work. And the Board on brief does not say otherwise. It does not choose to fight on this field.

(*iii*) The sharp dichotomy that the Board on brief would draw between an express term and an implied term does not in truth exist. "Implied Promises are also Express Promises, Found by Process of Interpretation." 3 Corbin, Contracts, § 562, p. 286. An express promise often requires interpretation to ascertain its import. An implied promise may be as commanding in its clarity as any which is express. "An implied promise . . . is . . . a promise implied in fact, a promise that the promisor himself made, but a promise that he did not put into promissory words with sufficient

clearness to be called an 'express promise.' When a court finds and enforces a promise such as this, it finds it by interpretation of the promisor's words and conduct in the light of the surrounding circumstances. This is the exact process by which the meaning of any contract is determined, whether it be described as an express contract or an implied contract. It is the same whether the contractor expressed his intentions in the form of words, oral or written, or expressed them by conduct wholly non-verbal, or used both forms of expression together. The meaning of his words and acts is found by relating them to the usages of the past; this is interpretation." *Id.*, § 562, pp. 286-288.

(d) The fundamental fallacy of the Board's approach on brief is exposed by its effort to distinguish this Court's decision in *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971) (Bd. Br. pp. 12-13). This Court in *Hardeman* repudiated a narrow reading of a union constitution, requiring instead that it be interpreted responsively to its character as a charter of union government, with deference due to the union's own reasonable and fair construction of its rules (our brief pp. 70-71, 82).

But, says the Board on brief (pp. 12-13), *Hardeman* is confined to the Labor-Management Reporting and Disclosure Act, "does not enunciate a general principle that is applicable to other statutes as well", dealt with the statutorily unprotected activity of assaulting a union official, and does not cabin the Board where the interpretation of a union constitution is relevant to the reach of the National Labor Relations Act. The Board's attempt to carve a special niche for itself is sleeveless. The nature of a union constitution as a charter of government does not change just because

the Board arrives on the scene. The Board has the same obligation as any other trier to honor a fair and reasonable interpretation. Nor is a simplistic rejection of recourse to implication in reading a union constitution any wiser when the Board asserts it. *Hardeman* rejected the dogma that " 'penal provisions in union constitutions must be strictly construed' " (401 U.S. at 242). That dogma does not become any more acceptable when the Board on brief enunciates an indistinguishable version by which it would confine a union constitution to its narrowest literal reading unaided by the ordinary process of implication.

The Board's attempted distinction on brief of *Hardeman* is indeed foreclosed by this Court's decision in *Allis-Chalmers*. The Court in *Allis-Chalmers* upheld the imposition of a court-collectible fine against a member for engaging in strikebreaking. But there was in that case no rule against strikebreaking as such. Guilt was based rather on " 'conduct unbecoming a Union member' " (388 U.S. at 177).[6] The union rule prohibiting "conduct unbecoming a Union member" was given specific content by interpreting it to bar strikebreaking. The rule on its face utterly lacks explicitness and depends on implication for its content. It can acquire meaning only as situations within and without its scope are spelled out in actual application. It was reasonably and fairly interpreted to forbid

[6] See, also, *Local 248, United Automobile Workers* v. *Natzke*, 36 Wis. 2d 237, 240, 153 N.W. 2d 602, 604 (1967), the state court counterpart to the *Allis Chalmers* unfair labor practice proceeding, identifying the offense with which the member was charged as "conduct unbecoming a member for having gone back to work during the strike." Accord, *Local 248, United Automobile Workers (Allis Chalmers)*, 149 NLRB 67, 75-76 (1964), affirmed, 388 U.S. 175 (1967).

strikebreaking because of the indispensability of strike solidarity in waging economic warfare. And it was an interpretation in an area of activity which involves the National Labor Relations Act.

There is, accordingly, no principled basis for distinguishing *Allis-Chalmers* from this case in terms of the use of implication to define a union rule. In *Allis-Chalmers* a general rule prohibiting conduct unbecoming a member was interpreted to bar strikebreaking. Here an explicit rule prohibiting strikebreaking is interpreted to bar a postresignation return to work. Given the use of implication in both cases, and the area of the National Labor Relations Act in which that use operates in the one case no less than in the other, *Hardeman* can be distinguished from this case only by repudiating *Allis-Chalmers*.

But *Hardeman* and *Allis-Chalmers* are both good law. Both are responsive to careful congressional concern " 'neither to undermine self-government within the labor movement nor to weaken unions in their role as bargaining representatives of employees.' " *Hodgson* v. *Local Union 6799, Steelworkers,* 403 U.S. 333, 338-339 (1971). Each respects the objective to "preserve and strengthen unions as self-regulating institutions . . . ." *Id.* at 339. In this case, interpreting its own charter of government, the Union as a self-governing institution fairly and reasonably concluded that its rule against strikebreaking barred a postresignation return to work. The statutory question which that interpretation presents is whether a ban on postresignation strikebreaking is valid under the National Labor Relations Act. It is that question which should be decided. The Board on brief, to avoid that question of statutory construction, would hobble a union with

artificial restrictions on the interpretation of its constitution. But the question of the interpretation of the constitution is perfectly straightforward and should be straightforwardly answered without mutilating narrowness. And given the interpretation that postresignation strikebreaking is barred, the statutory question which that interpretation presents is also perfectly straightforward and the Board should stop trying to avoid a straightforward answer to it.

3. *Validity of the rule:* Boeing argues that a ban of postresignation strikebreaking is invalid on the ground that "it would, as a practical matter, deprive [an] employee-member . . . of the right to resign from the Union at any time, because (a) . . . [it] binds him to the union rules *during* a strike and (b) he is bound to membership during the life of the contract" (br. p. 29). The argument is factually flawed. An agreement cannot bind an employee to full membership; it can only obligate the employee to pay union dues and an initiation fee. The employee need not assume any other obligation of union membership. If he becomes a full member, assuming all other obligations of union membership, it is not by compulsion of the agreement but by his own election that he takes that step. And he is still free after choosing full membership to revert to the status of a limited member during the term of the agreement. Indeed, under the provisions of the IAMAW's 1972 amendment of its constitution explicitly banning postresignation strikebreaking (our brief p. 58), he may even shed the obligation to refrain from strikebreaking if he resigns his full membership more than 14 days preceding the commencement of the strike. Following the expiration of the agreement, a full member is free to sever all relations with the Union, save

only that he must observe his preexisting obligation to refrain from strikebreaking for the duration of a current strike. His union obligations in every other respect are at an end. In short, an employee need never become a full member; he may revert to the status of a limited member at any time; and the sole restriction under the IAMAW constitution is that he must effectuate the reversion more than 14 days before a strike begins if he wishes to disavow his obligation to refrain from strikebreaking in the current dispute. This is little enough.

II. THE REASONABLENESS-OF-FINE ISSUE

1. In its brief, in addition to its assertion that the fine is excessive in amount, Boeing suggests that its imposition is arbitrary for an array of other reasons (br. pp. 7-8, 34-35, 45-47). In the Court of Appeals, Boeing made this argument in greater detail, and we include as an appendix to this brief the response we made in that court to the particularities of its claim of arbitrariness (*infra,* pp. 1a-16a).

Since the power of the Board to entertain the merits of the claim is the presently relevant point, it is pertinent to observe that Boeing would sweep the entirety of the administration of union discipline within the Board's purview. For it looks to the Board to consider not only the amount of the fine, but also the "method . . . and . . . time" of its payment, "as well as the manner in which the charges were filed and processed which led to the imposition of the fine or penalty" (br. p. 46). It seeks also an assessment of "other sanctions or punishments" imposed additional to the fine (*ibid.*). And it would inquire into "whether the employees were informed in advance" of the rule, "and

whether they were warned in advance that they would be penalized and to what extent or degree" (*ibid.*).

This is indeed a "multiplicity of factors" (*ibid.*) and it tellingly illustrates that this maelstrom is no part of the Board's authorized business. Furthermore, it is Boeing that complains that the members have been fined in an excessive amount and by arbitrary means. The employer is surely an unlikely private attorney general to assert the member's interest in a union-member controversy centered upon a claim of arbitrary administration of internal union discipline.

2. Boeing cites and quotes from the Board's decision in *Carpenters Local Union No. 22 (Graziano Construction Co.)*, 195 NLRB No. 5, 79 LRRM 1194 (1972), to support its view that review of internal union discipline is within the Board's proper purview (br. pp. 19, 41, 43, 44, 45). But the Board in that case held only that the particular union rule there at issue was invalid because in application it abridged rights conferred by the Labor-Management Reporting and Disclosure Act. It confined itself to determining the validity of the application of the rule by reference to external statutory criteria. It made no incursion into a union's internal affairs to ascertain whether a valid rule had been arbitrarily administered because the fine was excessive, the notice insufficient, the hearing inadequate, or like defects. What Boeing would have the Board do in this case is to cross from external substantive validity into internal union administration. The Board took no such step in *Carpenters Local Union No. 22.*

We cannot, however, forbear expressing our skepticism of the soundness of the step that the Board did

take. It invalidated application of a rule because it offended the LMRDA. But enforcement of the LMRDA is no part of its business. Other agencies and tribunals are commissioned to perform that task. The Board has committed the same error for which this Court rebuked it when it invalidated a so-called "hot cargo" provision of a collective bargaining agreement because it was said to violate the Interstate Commerce Act although the administration of that statute is entrusted to the Interstate Commerce Commission. *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 108-111 (1958). The Board should stick to its own last.

Respectfully submitted,

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